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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

BINYAM MOHAMED; ABOU ELKASSIM BRITEL; AHMED AGIZA; MOHAMED FARAG AHMAD BASHMILAH; BISHER AL-RAWI Plaintiffs, v. JEPPESEN DATAPLAN, INC. Defendant.	Case No. C-07-02798-JW NOTICE OF MOTION AND MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA Judge: Hon. James Ware Hearing Date: February 4, 2008 Hearing Time: 9:00 AM Courtroom: 8, 4th Floor

PLEASE TAKE NOTICE that, on February 4, 2008, before the Honorable James Ware, intervenor United States of America will move, and hereby does move, to dismiss this action pursuant to Rule 12 of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. As explained in the United States' memorandum in support of this Motion, the unclassified declaration invoking the military and state secrets privilege and a statutory privilege under the National Security Act, and the classified declaration submitted *in camera*, *ex parte*, the United States' invocation of these privileges requires dismissal of this action or, in the alternative, summary judgment against plaintiffs' claims.

Respectfully Submitted,

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Dated: October 19, 2007

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BINYAM MOHAMED; ABOU ELKASSIM BRITEL; AHMED AGIZA; MOHAMED FARAG AHMAD BASHMILAH; BISHER AL-RAWI Plaintiffs, v. JEPPESEN DATAPLAN, INC. Defendant.	Case No. C-07-02798-JW MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT Hon. James Ware, District Judge

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INTRODUCTION

This suit, though filed against a private defendant, Jeppesen Dataplan, Inc. ("Jeppesen"), attempts to probe the most sensitive details of intelligence operations allegedly conducted by the Central Intelligence Agency ("CIA"). Plaintiffs allege that agents of the United States and particular foreign governments, with the assistance of defendant Jeppesen, subjected plaintiffs to "forced disappearance, torture, and inhumane treatment" in violation of international law, as part of the CIA's "so-called 'extraordinary rendition" program." First Amended Compl. ¶¶ 1-2. Although the President and other officials have acknowledged that the CIA operates a terrorist detention and interrogation program ("program"), these officials have specifically refused to confirm or deny any operational details concerning that program--including whether any private entities or other countries assisted the CIA in conducting the program; the dates and locations of any detentions and interrogations; the methods of interrogation employed in the program; and the names of any individuals detained and interrogated by the CIA (other than fifteen individuals whose identities have been divulged so that they can be brought to trial). This information remains properly classified as sources and methods of intelligence gathering.

For the reasons set forth in both his public declaration and a classified declaration which has been lodged for the Court's *in camera*, *ex parte* review, the Director of the Central Intelligence Agency ("DCIA"), Gen. Michael V. Hayden, USAF, has determined that allowing plaintiffs' claims to proceed would risk the disclosure of highly classified information concerning the alleged "intelligence activities, sources, and methods" of the CIA. Formal Claim of State Secrets and Statutory Privileges By Gen. Michael V. Hayden, USAF, Director, Central Intelligence Agency ("Public Hayden Decl.") ¶ 3. Because making public such information "reasonably could be expected to cause serious--and, in some instances, exceptionally grave--damage to the national security of the United States," Gen. Hayden has asserted the state secrets privilege and a statutory privilege under the National Security Act to protect against its disclosure. *Id.* ¶¶ 3, 11.

In particular, Gen. Hayden's privilege assertions, discussed in greater detail below, cover the

classified operational details of the CIA terrorist detention and interrogation program, including: whether the CIA cooperated with particular foreign governments or private entities (like Jeppesen) in carrying out the program; the locations of detentions and interrogations conducted in that program; the methods of interrogation employed by the CIA; and the identities of any individuals detained in the program that have not already been acknowledged by the President or the CIA. *See* Public Hayden Decl. ¶ 20. There can be no dispute that Gen. Hayden has properly invoked these privileges. And, as set forth below, there should be no doubt that, affording his judgment the "utmost deference," Gen. Hayden has demonstrated that disclosure of this information reasonably could be expected to cause serious--and, in some instances, exceptionally grave--damage to national security.

Under well-established precedent, if the Court upholds Gen. Hayden's privilege assertions, the information covered by the privileges must be "completely removed from the case." *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). Where, as here, that information is central to the case, and where it is apparent now that plaintiffs' claims cannot be litigated absent this information, dismissal is required. *See id.* at 1166-67 (recognizing a class of cases that must be dismissed because their "very subject matter" is a state secret). Proceeding with this case would require plaintiffs to prove that they were detained and interrogated by the CIA; that they were subjected to the treatment they allege; and that the CIA cooperated with defendant and particular foreign governments in carrying out plaintiffs' detention and interrogation. Because this is the very information over which Gen. Hayden has asserted the privilege, "the very subject of this litigation is itself a state secret," and "no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1243-44 (4th Cir. 1985). Additionally, because the absence of this information deprives the plaintiffs of the ability to make out a *prima facie* case in support of their claims, and similarly deprives the defendant of information necessary to defend against these claims, the state secrets privilege would require dismissal of this suit even if its "very subject matter" were not a state secret. *See Kasza,* 133 F.3d at 1166.

The United States does not lightly invoke the state secrets or National Security Act privileges,

nor does it lightly seek dismissal of this action. To the contrary, we recognize that the result of these privilege assertions is to deprive plaintiffs of the information necessary to litigate their claims, and that this outcome is a "harsh sanction." *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992). However, as the Ninth Circuit has noted, "the results are harsh in either direction and the state secret doctrine finds the greater public good--ultimately the less harsh remedy--to be dismissal." *Kasza*, 133 F.3d at 1167 (quoting *Bareford*, 973 F.2d at 1144); *see also Fitzgerald*, 776 F.2d at 1238 n.3 ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants--through the loss of important evidence or dismissal of a case--in order to protect a greater public value."). That result is unavoidable in a case such as this, where "the very question upon which the case turns is itself a state secret." *Fitzgerald*, 776 F.2d at 1238.

BACKGROUND

I. THE PLAINTIFFS' CLAIMS AGAINST JEPPESEN

Each of the five plaintiffs in this action alleges that he was arrested, transported, detained, and interrogated as part of the CIA's terrorist detention and interrogation program. Plaintiffs contend that they were subject to "forced disappearance, torture, and inhumane treatment . . . by agents of the United States and other governments." First Amended Compl. ¶ 1. Plaintiffs further allege that defendant Jeppesen "provided direct and substantial services to the United States for its so-called 'extraordinary rendition' program, enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they were placed beyond the reach of the law and subjected to torture and other forms of cruel, inhuman, or degrading treatment." *Id.* ¶ 2.

The First Amended Complaint contains two discrete claims for relief. Each arises under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, which states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The first ATS claim alleges that Jeppesen is liable for Plaintiffs' forced disappearance. Plaintiffs contend that Jeppesen is "directly liable" for this alleged violation of international law,

because it "actively participated in numerous aspects of the logistical planning and implementation of the extraordinary renditions of Plaintiffs, with actual or constructive knowledge that its involvement would result in the secret apprehension and detention of Plaintiffs." First Amended Compl. ¶ 254. In addition, or in the alternative, Plaintiffs also assert that Jeppesen is liable under the ATS because it "conspired with agents of the United States in Plaintiffs' forced disappearance," because it "aided and abetted agents of the United States, Morocco, Egypt and Jordan in subjecting Plaintiffs to such treatment," and/or because it "demonstrated reckless disregard as to whether Plaintiffs would be subject to forced disappearance." *Id.* ¶ 255-57.

The second ATS claim alleges that Jeppesen is liable for Plaintiffs' alleged "torture and other cruel, inhuman, or degrading treatment by agents of the United States, Morocco, and Egypt." *Id.* ¶ 260. Unlike the first count, this claim does not allege that Jeppesen is directly liable for the alleged tort. Instead, it relies on the same indirect theories of liability that were advanced as alternative bases of liability in the first claim: namely, that Jeppesen "conspired with agents of the United States in Plaintiffs' torture and other cruel, inhuman, or degrading treatment, including their rendition to Morocco, Egypt, and Afghanistan," that it "aided and abetted agents of the United States, Morocco and Egypt in subjecting Plaintiffs to such treatment," and/or that it "demonstrated a reckless disregard as to whether Plaintiffs would be subjected to torture or other cruel, inhuman, or degrading treatment by providing flight and logistical support to aircraft and crew it knew or reasonably should have known would be used in the extraordinary rendition program." *Id.* ¶¶ 262-64.

II. THE UNITED STATES' STATE SECRETS PRIVILEGE ASSERTION

Gen. Hayden, the Director of the Central Intelligence Agency, has formally asserted the military and state secrets privilege, and has also asserted a claim of privilege under the National Security Act. *See* Public Hayden Decl. ¶ 11. Those privilege claims identify four categories of information put at issue by Plaintiffs' First Amended Complaint that cannot be inquired into in court proceedings without risking serious--and in some instances, exceptionally grave--danger to the national security:

A. Information that may tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with any alleged clandestine intelligence activities, including the CIA terrorist detention and interrogation program;

B. Information that may tend to confirm or deny any alleged cooperation between the CIA and foreign governments regarding clandestine intelligence activities;

C. Information concerning the scope and operation of the CIA terrorist detention and interrogation program, such as: the locations where detainees were held; whether or not the CIA cooperated with particular foreign governments or private entities in conducting this program; the interrogation methods used in the program; and the identities of any individuals detained by the CIA that have not already been publicly acknowledged; and

D. Any other information concerning CIA clandestine intelligence activities that would tend to reveal any intelligence activities, sources, or methods.

Id. ¶ 20. Gen. Hayden's Public Declaration makes clear that he made these privilege assertions after personal consideration of the allegations in the First Amended Complaint. *See id.* ¶ 11.

While Gen. Hayden's Public Declaration offers an explanation of why the information covered by these privilege assertions cannot be disclosed without risking harm to the national security and foreign relations of the United States, it also notes that the full extent of the information protected by the privilege, and the potential harms of disclosure of that information, cannot be discussed on the public record. *See* Public Hayden Decl. ¶¶ 11, 25. Thus, Gen. Hayden has also submitted a classified *in Camera*, *ex parte* declaration ("Classified Hayden Decl.") setting forth the full basis for his assertion of the state secrets and statutory privileges.[1]

[1] This classified *in camera*, *ex parte* declaration has been lodged with the Department of Justice's Security Officer, who will make arrangements for the Court to view the document at the Court's convenience. A separate Notice of Lodging is filed along with this brief providing the Court with contact information for that Security Officer.

ARGUMENT

I. PLEADING-STAGE RESOLUTION IS APPROPRIATE WHERE PRIVILEGED INFORMATION IS CENTRAL TO THE CASE AND IT IS CLEAR THAT THE CASE CANNOT BE LITIGATED WITHOUT THAT INFORMATION

A. The State Secrets Privilege Bars Use of Privileged Information Regardless of a Litigant's Need

Courts have long recognized the responsibility of the Executive Branch to protect military or state secrets from disclosure. *See, e.g.*, *Totten v. United States*, 92 U.S. 105 (1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807). In order to safeguard this type of sensitive material, the Executive Branch may assert the "state secrets privilege," which, when properly asserted, prevents the parties from adducing information that, if disclosed, would harm the national security. *See, e.g.*, *Reynolds*, 345 U.S. 1; *Kasza*, 133 F.3d 1159. Although this privilege "was developed at common law, it performs a function of constitutional significance" because it is essential to the President's Article II powers to conduct foreign affairs and provide for the national defense. *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007) (citing *United States v. Nixon*, 418 U.S. 683,710 (1974)), *cert. denied*, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007).

The privilege protects a broad range of state secrets, including information the disclosure of which would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (footnotes omitted); *see also Kasza*, 133 F.3d at 1166 ("[T]he Government may use the state secrets privilege to withhold a broad range of information."). The privilege protects information that, on its face, may appear innocuous but which in a larger context could reveal sensitive classified information. *See Kasza*, 133 F.3d at 1166. Courts often observe that foreign intelligence gathering is akin to the construction of a "mosaic," where each discrete piece of information is part of a larger picture of intelligence activities. *See, e.g.*, *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) ("*Halkin I*") ("Thousands of bits and pieces of seemingly innocuous

information can be analyzed and fitted into place by skilled foreign agents to reveal with startling clarity how the unseen whole must operate."). "Accordingly, if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the Government to disentangle this information from other classified information." *Kasza*, 133 F.3d at 1166.

As a procedural matter, "[t]he privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Reynolds*, 345 U.S. at 7. "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer." *Id.* at 7-8 (footnotes omitted).

In assessing whether to uphold a claim of the state secrets privilege, the court does not balance the respective needs of the parties for the information. Rather, "[o]nce the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets, the privilege is absolute." *Kasza*, 133 F.3d at 1166. Thus, even though "the claim of privilege should not be lightly accepted," where it is properly asserted to protect military and state secrets, "even the most compelling necessity cannot overcome the claim of privilege." *Reynolds*, 345 U.S. at 11; *Kasza*, 133 F.3d at 1166. *See also In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) (state secrets privilege "renders the information unavailable regardless of the other party's need in furtherance of the action"); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) (state secrets privilege "cannot be compromised by any showing of need on the part of the party seeking the information"). "No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg*, 709 F.2d at 57.

B. A Court Must Afford "Utmost Deference" to the Government's Predictions of the Harm that Would Result From Disclosure of State Secrets

As the Ninth Circuit has recognized, "the court's review of the claim of [state secrets] privilege is narrow." *Kasza*, 133 F.3d at 1166. Affording the United States' predictive judgments about the harm of disclosure the "utmost deference," a court must uphold the privilege assertion if

it is satisfied that the government has demonstrated a "reasonable danger" that disclosure of the information will harm the national security. *See, e.g.*, *Reynolds*, 345 U.S. at 10; *Kasza*, 133 F.3d at 1166; *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). "[W]hen a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not--indeed, should not--probe further." *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005), *cert. denied sub nom. Sterling v. Goss*, 546 U.S. 1093 (2006).

For both "constitutional" and "practical" reasons, this Court's review of the privilege assertion must begin with the Director's predictive judgment about the harms that would result from disclosure of state secrets. *El-Masri*, 479 F.3d at 305. Concern about courts' institutional competence to assess the harm to national security from the disclosure of classified information is particularly acute in the context of intelligence-gathering activities. *See El-Masri*, 479 F.3d at 305 ("[T]he executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis . . . ." (citation omitted)); *Halkin I*, 598 F.2d at 9 ("The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972))); *Ellsberg*, 709 F.2d at 57 n.31 ("[T]he probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise in this area.").

This "utmost deference" standard does not require a court to abdicate its judicial role. *See El Masri*, 479 F.3d at 312. To the contrary, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8; *see also In re Under Seal*, 945 F.2d at 1288 ("Although the privilege is absolute when properly invoked, the court is the final arbiter of the propriety of its invocation."). Out of respect for the Court's duty to determine whether the privilege was properly invoked (and whether, if so, the case can proceed), Gen. Hayden has submitted a classified, *in camera*, *ex parte* declaration that describes in detail the

full extent of the information covered by his privilege assertions and the harm that would result from that information's disclosure, even though the law generally does not require such submissions. *See, e.g.*, *Reynolds*, 345 U.S. at 10 ("[W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.").

C. Where the State Secrets Are Central to a Case, the Case Cannot Proceed

Once the court has upheld a claim of the state secrets privilege, the evidence and information identified in the privilege assertion is "completely removed from the case," *Kasza*, 133 F.3d at 1166, and the court must undertake a separate inquiry to determine the consequences of this exclusion on further proceedings. "The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case." *El-Masri*, 479 F.3d at 306. "If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue." *Id.* However, if the state secrets "will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters," the case must be dismissed. *Fitzgerald*, 776 F.2d at 1241-42; *see also El-Masri*, 479 F.3d at 306 ("[I]f 'the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,' dismissal is the proper remedy.'" (quoting *Sterling*, 416 F.3d at 348)). In such circumstances courts have noted that the "very subject matter" of the action is a state secret, and that resolution of the action "based solely on the invocation of the state secrets privilege" is appropriate. *Kasza*, 133 F.3d at 1166 (citing *Reynolds*, 345 U.S. at 11 n.26).

Courts may dismiss a suit because its "very subject matter" is a state secret even where the suit seeks to adduce information about activities that the government has (at least partially) acknowledged. For example, in *Fitzgerald*, the court concluded that a libel suit arising out of activities related to a classified Navy program for training marine animals could not proceed, even though the government officially acknowledged the program's existence, because classified aspects

of how the program operated would have been at issue in any adjudication of the alleged libel. *See Fitzgerald*, 776 F.2d at 1242-43 (noting that the "very subject of this litigation is itself a state secret."). Similarly, in *El-Masri*, the court found that a tort suit against government officials and corporate defendants arising out of an alleged "extraordinary rendition" as part of the CIA terrorist detention and interrogation program--the very same program at issue in this case--could not proceed, even though the government officially acknowledged the program's existence, because such litigation would necessarily probe the program's still-classified operational details. *See El-Masri*, 479 F.3d at 308-09.

Moreover, where the "very subject matter" of a suit is a state secret, a plaintiff's alleged personal knowledge of the facts set forth in a complaint is irrelevant if those allegations cannot be *litigated* without threatening the disclosure of state secrets. As the court noted in *El-Masri*:

> El-Masri is therefore incorrect in contending that the central facts of this proceeding are *his allegations* that he was detained and interrogated under abusive conditions, or that the CIA conducted the rendition program that has been acknowledged by United States officials. Facts such as those furnish the general terms in which El-Masri has related his story to the press, but advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants *in a court of law*.

Id. (emphasis added). *See also Black v. United States*, 62 F.3d 1115, 1117-19 (8th Cir. 1995) (upholding a state secrets privilege assertion even though plaintiff claimed personal knowledge of alleged contacts with CIA agents); *Fitzgerald*, 776 F.2d at 1237, 1242 & n.8 (upholding state secrets privilege over information about a Navy marine mammal program despite the fact that the plaintiff was involved with the program and had "*personal knowledge of classified matters within the scope of the*" privilege assertion) (emphasis added); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 538 (E.D. Va. 2006) ("It is self-evident that a private party's allegations purporting to reveal the conduct of the United States' intelligence services overseas are entirely different from the official admission or denial of those allegations."). These cases correctly recognize that the focal point of the analysis is whether proving such allegations *through litigation* would cause harm, not whether private individuals or entities have previously made, or could make, public statements or allegations.

Even if the "very subject matter" of an action is not a state secret, if the plaintiff cannot make out a *prima facie* case absent the excluded state secrets, the case must be dismissed. *See Kasza*, 133 F.3d at 1166; *Halkin v. Helms*, 690 F.2d 977, 998-99 (D.C. Cir. 1982) ("*Halkin II*"); *Fitzgerald*, 776 F.2d at 1240-41. Similarly, if the privilege "'deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" *Kasza*, 133 F.3d at 1166 (quoting *Bareford*, 973 F.2d at 1141).

D. This Case Should Be Resolved at the Pleading Stage

Plaintiffs already have evinced a fundamental misunderstanding of the effect of asserting the state secrets and statutory privileges in this litigation. In opposing Defendant's Motion to Change Time, plaintiffs stated that assertion of the state secrets privilege "before there is any evidence at issue" is "premature as a matter of law." Plaintiffs' Opposition to United States' Request for a Stay and Defendant's Motion to Change Time ("Pls. Opp. Change Time") (Docket #38) at 1. That claim--which, plaintiffs concede, is directly contrary to the Fourth Circuit's holding in *El-Masri*, *see* Pls. Opp. Change Time at 1 n.1--is simply incorrect. "[D]ismissal on the pleadings" is appropriate where "the very subject matter of the action was a state secret." *El-Masri*, 479 F.3d at 306 (citing *Tenet*, 544 U.S. at 9, *Reynolds*, 345 U.S. 1, and *Totten*, 92 U.S. 105).

The Supreme Court has repeatedly upheld (or directed) the pleading-stage dismissals of suits whose "very subject matter" is a state secret. For example, in *Totten v. United States*, 92 U.S. 105 (1875), the court refused to entertain a suit attempting to enforce an alleged espionage contract between the President and a private citizen, who purportedly agreed to undertake clandestine intelligence-gathering activities. The Court observed that "[i]t may be stated as a general principle, that public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 107 (emphasis added).

Applying *Totten*, the Supreme Court has upheld several subsequent pleading-stage dismissals of actions in which state secrets were central to the maintenance of the suit. In *Weinberger v.*

Catholic Action of Haw./Peace Ed. Project, 454 U.S. 139 (1981), for example, the Court found that a suit seeking to compel the Navy to prepare an Environmental Impact Statement about the hypothetical effects of storing nuclear weapons at a particular facility could not go forward, because national security concerns prevented the Navy from confirming or denying whether it stored nuclear weapons at the facility. *See id.* at 146-47 (citing *Totten*, 92 U.S. at 107, and *Reynolds*, 345 U.S. 1). Similarly, the Court upheld a pleading-stage dismissal in *Tenet v. Doe*, 544 U.S. 1, 8-9 (2005), where, like in *Totten*, the plaintiff attempted to enforce the terms of an alleged espionage contract. The Court cited *Totten*, *Reynolds*, and *Weinberger* for the proposition that cases that will inevitably lead to the disclosure of state secrets should not proceed beyond the pleading stage. *Id.* at 8. Indeed, even in *Reynolds*--a case where the Court upheld the assertion of the state secrets privilege but nevertheless allowed the suit to proceed past the pleading stage--the Court approvingly cited *Totten*'s observation that dismissal would be appropriate in instances where state secrets are central to the litigation. *See* 345 U.S. at 11 n.26 (noting that in *Totten*, "where the very subject matter of the action . . . was a matter of state secret," the Court properly "dismissed on the pleadings *without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege" (emphasis added)).[2]

Following this Supreme Court guidance, the Ninth Circuit has resolved state secrets privilege cases at the pleading stage because the facts central to the litigation were covered by the assertion of the privilege. In *Kasza*, for example, the Ninth Circuit found that a valid assertion of the state

[2] Even though *Totten* itself concerned the narrow circumstance of a contract for clandestine espionage services, the "general principle" announced therein is not limited to that context. Rather, it applies more generally to "*any suit* . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Tenet*, 544 U.S. at 8 (rejecting court of appeals' conclusion that "*Totten* developed merely a contract rule, prohibiting breach-of-contract claims seeking to enforce the terms of espionage agreements"). *See also El-Masri*, 479 F.3d at 306 ("In a recent decision unanimously reaffirming *Totten*'s validity, the Supreme Court approvingly quoted *Reynolds*'s discussion of *Totten* as a matter in which dismissal on the pleadings was appropriate because the very subject matter of the action was a state secret.").

secrets privilege over "the very subject matter" of the litigation prevented the case from proceeding past the pleading stage:

> Not only does the state secrets privilege bar Frost from establishing her prima facie case on any of her eleven claims, but any further proceeding in this matter would jeopardize national security. No protective procedure can salvage Frost's suit. Therefore, as the very subject matter of Frost's action is a state secret, we agree with the district court that her action must be dismissed.

Kasza, 133 F.3d at 1170. Similarly, in *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 816 (9th Cir. 1989), the Ninth Circuit noted that, "[c]ontrary to [appellant's] assertion at oral argument, the state secrets privilege *alone can be the basis for dismissal of an entire case*." (emphasis added).

While this Supreme Court and Ninth Circuit precedent is more than sufficient to defeat Plaintiffs' contrary contention that pleading-stage dismissals are "premature as a matter of law," these holdings are by no means outliers. Numerous other courts of appeals have followed the Supreme Court's lead in *Totten*, *Reynolds*, *Weinberger*, and *Tenet*, by resolving cases at the pleading stage because the suits' "very subject matter" was a state secret, or where it was clear at the outset that the parties' claims and defenses could not be established without recourse to such secrets. *See, e.g.*, *Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004); *El-Masri*, 479 F.3d at 311; *Sterling*, 416 F.3d at 348 (quoting *Molerio v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1982)); *Black v. United States*, 62 F.3d 1115, 1118-19 (8th Cir.1995); *Bareford*, 973 F.2d at 1140; *Zuckerbraun*, 935 F.2d at 548; *Fitzgerald*, 776 F.2d at 1243; *Halkin II*, 690 F.2d at 1001. *Cf. American Civil Liberties Union v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (dismissing Fourth Amendment claim on standing grounds because "the plaintiffs do not--and because of the State Secrets Doctrine cannot--produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants"), *petition for cert. filed* (Oct. 3, 2007) (No. 07-468); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (affirming dismissal of the United States as a party before discovery because "no amount of effort or care will safeguard the privileged information . . . . [I]t is evident that the case against the United States cannot be tried without compromising the information sought to be protected"). This long, unbroken line of cases holding that pleading-stage

resolution of state secrets privilege cases may be both appropriate and necessary amply defeats plaintiffs' contention that such dismissals are "premature as a matter of law."

* * *

In light of these principles, two issues remain for this Court's consideration. First, granting the Director's judgment the "utmost deference," the Court must determine whether Gen. Hayden has demonstrated that there is at least a reasonable danger that disclosure of the privileged information will cause harm to the national security. Second, if the Court determines the privileges are properly asserted, it must also determine whether the privileged information concerns the "very subject matter" of the case or is so central to the case that the case cannot be litigated without reference to privileged information. As set forth below, both questions must be answered in the affirmative; therefore, this Court should dismiss the suit or, in the alternative, enter summary judgment against plaintiffs.[3]

[3] This Motion is styled as a Motion to Dismiss or, in the Alternative, for Summary Judgment, because some courts have suggested that "[t]he precise rule under which dismissal should occur is not entirely clear." *Zuckerbraun*, 935 F.2d at 547. While courts, including the Ninth Circuit, regularly speak of "dismissing" cases on state secrets privilege grounds where the "very subject matter" is a state secret, *see, e.g.*, *Kasza*, 133 F.3d at 1166, some courts have suggested that "[w]here the effect of the invocation of the privilege is to prevent the plaintiff from establishing a prima facie case, the dismissal is probably most appropriate under Rule 56 on the ground that plaintiff, who bears the burden of proof, lacks sufficient evidence to carry that burden." *Zuckerbraun*, 935 F.2d at 547. Because the "very subject matter" of this suit is a state secret, dismissal under Rule 12 is appropriate. If, however, the Court were to conclude that Rule 56 is the applicable Rule, summary judgment would be appropriate.

II. THE DCIA HAS PROPERLY ASSERTED THE STATE SECRETS PRIVILEGE IN THIS CASE

A. The Declarations from the Director of the CIA Meet all of the Procedural Requirements for Invoking the State Secrets Privilege

The United States has properly asserted the state secrets privilege in this case. Where the state secrets privilege is asserted, there must be (1) a "formal claim of privilege"; (2) "lodged by the head of the department which has control over the matter"; and (3) "after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8; *see also Kasza*, 133 F.3d at 1169 ("Here, after actual personal consideration, the person that *Reynolds* requires to claim the privilege publicly claimed it."). There can be no dispute that all three criteria are met here.

First, the Director of the Central Intelligence Agency, Gen. Michael V. Hayden, has submitted a formal claim of the state secrets and statutory privileges. *See* Public Hayden Decl. ¶ 11. Moreover, in his public and classified declarations, Gen. Hayden explains how the disclosure of the intelligence activities, sources, and methods covered by these privilege assertions would cause serious--and, in some instances, exceptionally grave--damage to national security. *See* Public Hayden Decl. ¶¶ 21-25; Classified Hayden Decl. ¶¶ 32-50, 54-70, 74.

Second, Gen. Hayden is the "head of the department which has control over the matter[s]" covered by the assertion of the privilege. *Reynolds*, 345 U.S. at 8. As the Director of the CIA, Gen. Hayden "lead[s] the CIA and manage[s] the Intelligence Community's human intelligence and open source collection programs on behalf of the Director of National Intelligence (DNI)." Public Hayden Decl. ¶ 1. Gen. Hayden is thus statutorily charged with "collecting information through human sources and by other appropriate means, correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence, providing overall direction for coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to undertake such collection, and performing such other functions and duties related to intelligence affecting the national security as the President, or the Director of National Intelligence (DNI), may direct." *Id.* ¶ 5 (citing 50 U.S.C.§

403-4a(d)). Additionally, the Director of National Intelligence, who serves as head of the nation's intelligence community, has directed the DCIA to "protect[] CIA sources and methods from unauthorized disclosure." *Id.* ¶ 6. The information covered by Gen. Hayden's assertion of the privilege, which concerns allegations related to the CIA's terrorist detention and interrogation program, clearly falls within these responsibilities, making Gen. Hayden the relevant "head of the department which has control over the matter" at issue in this case.

Third, and finally, Gen. Hayden made this assertion of the state secrets privilege "in [his] capacity as head of the CIA after personal consideration of the matter." Public Hayden Decl. ¶ 11. Thus, all three of the *Reynolds* criteria for properly asserting the privilege are met.

B. The Director Has Demonstrated That Disclosure of the Information Covered By The Privilege Assertions Reasonably Could Be Expected to Cause Serious--And, In Some Instances, Exceptionally Grave--Damage to the National Security and Foreign Relations of the United States

As noted above, "the court's review of the claim of [state secrets] privilege is narrow." *Kasza*, 133 F.3d at 1166. "[T]he court must be satisfied that under the particular circumstances of the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Id.* (quoting *Reynolds*, 345 U.S. at 10). In making that determination, the Court must give "utmost deference" to the government's assessment of the damage that would flow from the disclosure of the information in question. *See, e.g.*, *Kasza*, 133 F.3d at 1166; *Zuckerbraun*, 935 F.2d at 547; *Halkin I*, 598 F.2d at 9. "[W]hen a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not--indeed, should not--probe further." *Sterling*, 416 F.3d at 345.

Gen. Hayden's public and classified *in camera*, *ex parte* declarations fully support his assessment that the risk of damage flowing from disclosure of the privileged information in this case is "substantial and real." *Sterling*, 416 F.3d at 345. For example, Gen. Hayden explains that disclosure of information concerning whether or not Jeppesen or other private entities assisted the United States with clandestine intelligence activities reasonably could be expected to damage

national security because that information would reveal to adversaries the scope and capabilities of the United States' clandestine intelligence programs. *See* Public Hayden Decl. ¶ 21. The CIA is not free to disclose who it does or does not work with, in what capacity, and to what extent, in connection with clandestine activities, because that information constitutes one of the sources and methods of intelligence gathering that must be protected. *See Maxwell v. First Nat. Bank of Maryland*, 143 F.R.D. 590, 599 (D. Md. 1992) ("The state secret that must be protected is the existence of any relationship between the CIA and ATC or FNB."), *aff'd*, 998 F.2d 1009 (4th Cir. 1993) (Mem.), *cert. denied*, 510 U.S. 1091 (1994). To disclose how clandestine activities are (or are not) conducted would, quite obviously, disclose classified information. The United States has a longstanding practice of generally refusing to confirm or deny allegations concerning clandestine intelligence activities because if the United States were to deny such allegations where they are incorrect, that would create an inference that such allegations must be correct when they are not denied. *See* Public Hayden Decl. ¶ 9.[4]

Similarly, Gen. Hayden explains why information tending to confirm or deny whether the United States cooperated with particular foreign governments in carrying out clandestine intelligence activities, including the terrorist detention and interrogation program, cannot be disclosed without damaging the national security and foreign relations of the United States. As Gen. Hayden notes, "[w]hen foreign governments cooperate with the CIA in clandestine intelligence activities, they do so under assurances from the CIA that the fact of their cooperation will remain secret." Public

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[4] The fact that the United States is not named as a defendant in the First Amended Complaint does not lessen its need to avoid disclosures of information covered by the privilege assertions. Courts have recognized that development of factual issues surrounding allegations of clandestine intelligence activities--even if conducted by private parties--can nonetheless encroach upon state secrets that the privilege is designed to protect. *See, e.g.*, *Terkel v. AT & T Corp.,* 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006) ("[T]he Court is persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secrets privilege.")

Hayden Decl. ¶ 23. If the United States were forced to respond to such allegations of cooperation with other countries--or if the parties were permitted to offer proof in a United States court concerning such allegations--it would violate the assurances of secrecy that the CIA gives its intelligence partners. In the future, such partners would be less likely to cooperate with the United States in intelligence-gathering activities. This lack of cooperation would have obvious, negative consequences for the foreign relations and foreign activities of the United States. *See id.*

Gen. Hayden's declarations also demonstrate that disclosure of information concerning the other alleged operational details of the CIA terrorist detention and interrogation program--including the identities of individuals subject to the program, the dates and locations of any such detention and interrogation, and the interrogation methods employed as part of that program--can reasonably be expected to cause damage to the national security. This type of information constitutes the heart of the CIA's sources and methods of intelligence gathering. *See* Public Hayden Decl. ¶ 24. Permitting litigation over whether these plaintiffs were in CIA custody in the places and at the times alleged in the First Amended Complaint, whether they were subject to the treatment they allege, and whether Jeppesen was involved in or aware of such alleged treatment, would result in a full exploration of the workings of the CIA's clandestine intelligence activities. Gen. Hayden notes that permitting the parties to probe this information would degrade the effectiveness of the CIA's intelligence-gathering capabilities by, for example, "providing terrorists information about interrogation methods that would assist their interrogation resistance programs." *Id.*

Finally, Gen. Hayden makes clear that the full scope of the information subject to his privilege assertions, and the assessment of all the harms that would follow from the disclosure of that information, cannot be discussed on the public record. *See* Public Hayden Decl. ¶ 25. Therefore, Gen. Hayden has submitted a classified *in camera*, *ex parte* declaration to fully explain his bases for asserting the privileges. Affording these assessments of the harm that would flow from the disclosure of the privileged information "utmost deference," there can be no doubt that there is a "reasonable danger" that proceeding with this case would result in the disclosure of information

"which, in the interest of national security, should not be divulged," and that the privileges have been validly asserted. *Kasza*, 133 F.3d at 1166 (internal quotation marks omitted).

C. The Director's Assertion of the State Secrets and Statutory Privileges Over the Information in Question is Proper, Notwithstanding the Executive Branch's Limited Acknowledgment of the Existence of the CIA Terrorist Detention and Interrogation Program, and Public Speculation Concerning that Program

Plaintiffs' First Amended Complaint alleges that then-Director of the CIA George Tenet publicly "described the rendition program as a key counterterrorism tool" in October 2002. *See* First Amended Compl. ¶¶ 33. As noted in Gen. Hayden's Public Declaration, the President and other public officials, including Secretary of State Rice, former CIA Directors, and the DCIA himself, have publicly acknowledged the program's existence. *See* Public Hayden Decl. ¶¶ 12-15 & nn.7-8. Importantly, however, none of these officials disclosed the operational details of this program; indeed, they specifically refused to do so. *Id*.

Public confirmations of the mere *existence* of the program do not undermine the Director's decision to assert the privilege with respect to the program's *operational details*. Limited declassification of some information concerning a classified program--in this instance, the program's existence, and the identities of fifteen suspected terrorists who are to be brought to trial (none of whom is a plaintiff in this action)--does not require full disclosure of the other, still-classified aspects of that program. *See, e.g., Ellsberg*, 709 F.2d at 59-60 (government could invoke the state secrets privilege over whether certain plaintiffs were subject to government surveillance, even though it previously disclosed that other individuals had been the subject of such surveillance); *Halkin I*, 598 F.2d at 9 (government could assert state secrets privilege as to whether plaintiff in *Halkin I* had been subjected to surveillance even though it acknowledged conducting surveillance of an individual in another case). *See also Ctr. for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 930-31 (D.C. Cir. 2003) ("The disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on its investigation."); *Salisbury* v. *United States*, 690 F.2d 966, 971 (D.C. Cir.

1982) ("The fact of disclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); *Military Audit Project v. Casey*, 656 F.2d 724, 752-53 (D.C. Cir. 1981) (rejecting the suggestion that "because the government has revealed some documents it previously considered too sensitive to release, it now must reveal all"). Numerous other facts about the program, and the CIA's intelligence operations in general, remain highly classified despite the government's limited declassification of the program's existence. Forcing the disclosure of such facts based on the extremely limited public description of the CIA terrorist detention and interrogation program would, as Gen. Hayden explains, cause irreparable harm to the national security by compromising sensitive intelligence sources and methods. *See* Public Hayden Decl. ¶¶ 21-25; Classified Hayden Decl. ¶¶ 32-50, 54-70, 74.

Similarly, the reports by media outlets, public interest groups, and international organizations cited in the First Amended Complaint, *see, e.g.*, ¶¶ 16-17, 38-39, 44-47, which purport to probe the operational details of the CIA terrorist detention and interrogation program, do not undermine the Director's assertion of the state secrets and statutory privileges. The statements in these reports, even if made by individuals who allege first-hand knowledge, cannot work to declassify information that the Director affirms is properly classified. *See, e.g.*, *Terkel*, 441 F. Supp. 2d at 913-14 (rejecting contention that media reports about NSA surveillance program render state secrets privilege inapplicable); *see also El-Masri*, 479 F.3d at 311 n.5 (declining to endorse plaintiff's theory that information is ineligible for protection under the state secrets privilege simply because it has been published in the news media). Classified information is not considered to be "in the public domain *unless there had been official disclosure of it.*" *Knopf v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (emphasis added). "Official disclosure" does not mean public discussion of the information by overt sources. To the contrary, a finding that classified information has been "official disclosed" requires that: (1) the information at issue must be as specific as the information that has been publicly disclosed; (2) the disputed information must exactly match the information publicly disclosed, *e.g.*, it must involve the same time period or same operation; and (3) the information sought to be released

must already have been publicly released through "an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)). Plaintiffs have not alleged, let alone demonstrated, that the program's operational details have been officially disclosed under this rigorous standard.

III. THE DCIA HAS PROPERLY ASSERTED A STATUTORY PRIVILEGE UNDER THE NATIONAL SECURITY ACT

The state secrets privilege is sufficient, on its own, to require removal of the information covered by the Director's privilege assertions from this case. As the D.C. Circuit observed, "[a] ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list." *Halkin I*, 598 F.2d at 7. However, because the information subject to the Director's privilege assertions concerns the sources and methods of intelligence gathering, that information is also protected by a separate statutory privilege under Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i)(1).[5] *See* Public Hayden Decl. ¶ 11. This statute requires the Director of National Intelligence ("DNI") to protect intelligence sources and methods from unauthorized disclosure. Under the DNI's direction pursuant to Section 102(A) of the National Security Act, as amended, and consistent with Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g, and Executive Order 12333 §§ 1.3(a)(5), (h), Gen. Hayden is responsible for protecting CIA sources and methods from unauthorized disclosure. *See* Public Hayden Decl. ¶ 6.

This authority to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *Fitzgibbon*, 911 F.2d at 761, and has been described by the Supreme Court as both "sweeping," *CIA v. Sims*, 471 U.S. 159, 169 (1985), and "wideranging," *Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute "the heart of all intelligence operations," *Sims*, 471 U.S. at 167, and "[i]t is the responsibility of the

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[5] The National Security Act was amended in 2004 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

[intelligence community], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *Id.* at 180. Thus, "courts are required to give 'great deference' to the CIA's assertion that a particular disclosure could reveal intelligence sources or methods." *Berman v. C.I.A.*, __ F. 3d __, 2007 WL 2472858, *3 (9th Cir. 2007) (quoting *Sims*, 471 U.S. at 179).

This statutory privilege, which is asserted over the same sources and methods of intelligence gathering covered by the state secrets privilege, *see* Public Hayden Decl. ¶ 11, provides an additional, independent basis for dismissal of this suit. Moreover, the fact that intelligence sources and methods are subject to express statutory protections illustrates that the need to protect such information is recognized by Congress as well as the Executive Branch.

IV. INFORMATION SUBJECT TO THE STATE SECRETS AND STATUTORY PRIVILEGES IS CENTRAL TO THIS CASE AND, THUS, THIS ACTION CANNOT PROCEED

"Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege." *Fitzgerald,* 776 F.2d at 1243. Where, as here, "the very subject of this litigation is itself a state secret," the case should be dismissed at the outset. *Id.*

Plaintiffs bring two claims under the Alien Tort Statute. The first alleges that Jeppesen is both directly and vicariously liable for the tort of enforced disappearance. This count alleges that, "[p]ursuant to the extraordinary rendition program, Plaintiffs were subjected to forced disappearance by agents of the United States, Morocco, and Egypt," and that "[t]he entire extraordinary rendition program is premised on the secret detention of suspects without any official acknowledgment of the location or fact of their detention." First Amended Compl. ¶ 253. Plaintiffs' second count alleges that plaintiffs were "subjected to torture and other cruel, inhuman, or degrading treatment by agents of the United States, Morocco, and Egypt." First Amended Compl. ¶ 260. Unlike the forced disappearance count, this count does not allege direct liability for Jeppesen; instead, it contends that

Defendant is vicariously liable for the actions of the United States and other governments. *See id.* ¶¶ 262-64 (alleging vicarious liability ranging from conspiracy to reckless disregard).

Neither of these claims can be litigated without recourse to information subject to the state secrets and statutory privileges. By their own terms, these claims are premised on the notion that plaintiffs were part of the CIA terrorist detention and interrogation program; that the United States cooperated with particular foreign governments in conducting that program; that Jeppesen culpably assisted the United States and foreign governments in conducting the alleged activities; and that the claimed torts actually occurred as plaintiffs allege. This information is covered by Gen. Hayden's privilege assertions. *See* Public Hayden Decl. ¶ 20. As explained in Gen. Hayden's public and classified *in camera*, *ex parte* declarations, none of this information can be adduced on the public record because disclosures concerning these issues reasonably could be expected to cause serious--and, in some instances, exceptionally grave--damage to the national security and foreign relations of the United States.

Simply put, the parties cannot litigate whether plaintiffs suffered the alleged torts if they cannot adduce information concerning whether these plaintiffs were part of the CIA terrorist detention and interrogation program and whether the defendant assisted the United States in that program. Moreover, even if--indeed, *especially if*--plaintiffs could establish that they were a part of that program, the parties cannot be permitted to litigate over the details of how that program is or was carried out. As in *El-Masri*, the information necessary to proceed cannot be disclosed without risking serious--and, in some instances, exceptionally grave--damage to national security:

> If El-Masri's civil action were to proceed, the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges. To establish a *prima facie* case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. . . . With respect to the defendant corporations and their unnamed employees, El-Masri would have to demonstrate the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet v. Doe*. Even marshalling the evidence necessary to make the requisite

> showings would implicate privileged state secrets, because El-Masri would need to rely on witnesses whose identities, and evidence the very existence of which, must remain confidential in the interest of national security.

El-Masri, 479 F.3d at 309 (internal citations omitted). Thus, the Court--like the court in *El-Masri* --should dismiss this suit without further proceedings. Because it is the Court's duty not to "jeopardize the security which the privilege is meant to protect," *Reynolds*, 345 U.S. at 10, this Court should not risk inadvertent disclosure of classified information by allowing the case to proceed past the pleading stage. "Courts are not required to play with fire and chance further disclosure--inadvertent, mistaken, or even intentional--that would defeat the very purpose for which the privilege exists." *Sterling*, 416 F.3d at 344.

CONCLUSION

For all of the foregoing reasons, this court should uphold Gen. Hayden's assertion of the state secrets and statutory privileges and dismiss the case or, in the alternative, enter summary judgment against plaintiffs' claims.

Respectfully Submitted,

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Dated: October 19, 2007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES and accompanying MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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